IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-736

SOUTH AFRICAN MARINE CORPORATION, LTD.,
Petitioner,

v.

ELGIE & COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VINCENT L. LEIBELL, JR.
Counsel for Respondent
14 Wall Street
New York, New York 10005

JOHN T. KOCHENDORFER
BIGHAM, ENGLAR, JONES & HOUSTON
14 Wall Street
New York, New York 10005
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-736

SOUTH AFRICAN MARINE CORPORATION, LTD.,

Petitioner,

v.

ELGIE & COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent prays that a Writ of Certiorari be denied to petitioners to review the judgment and opinion of the United States Court of Appeals, Second Circuit, first entered in this case June 11, 1979, as to which rehearing was denied August 10, 1979.

Opinions Below

The opinions of Judge Goettel of the United States District Court for the Southern District of New York, neither being officially reported, are set forth in chronological

order in petitioners' brief as Appendix A, at pages 1a and 25a respectively. The opinion of the United States Court of Appeals, Second Circuit, reported at 599 F.2d 1177 (2d Cir. 1979), is set forth in Appendix B, at page 1b. The Order of the Court of Appeals which denies Appellant's petition for rehearing is set forth in Appendix C, at page 1c.

Jurisdiction

On June 11, 1979, the Court of Appeals entered its judgment reversing the decision of the District Court insofar as it limited Petitioner's liability to $500 under the provisions of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 et seq. A timely petition for rehearing *en banc* was denied on August 10, 1979, and a petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked by petitioner under 28 U.S.C. § 1254(1) (1976).

Questions Presented

1. Does the $500 package limitation in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1304(5) apply to damages, suffered by an innocent purchaser for value resulting from the issuance by a steamship company of a false bill of lading? At the time the bill of lading was issued the cargo was already misplaced, and it was never delivered to the consignees.

2. Should COGSA be interpreted as limiting the recovery of respondent pursuant to the Federal Bills of Lading Act of 1916 (Pomerene Act), 49 U.S.C. § 102, when COGSA § 1303(4) states. *"That nothing in this chapter shall be construed as repealing or limiting* the application of *any part* of sections 81 to 124 of Title 49 (the Pomerene Act). (Emphasis added)

Statutes Involved

The Carriage of Goods by Sea Act, Title 46:

§ 1303(4). Bill as prima facie evidence

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c) of this section: *Provided, that nothing in this chapter shall be construed as repealing or limiting the application of any part of Sections 81 to 124 of Title 49 (the Pomerene Bills of Lading Act).* (Emphasis Added)

§ 1304(4). Deviations.

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation be for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

§ 1304(5). Amount of Liability; valuation of cargo.

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

The Pomerene Bills of Lading Act, Title 49.

§ 100. When goods are loaded by a carrier, such carrier shall count the packages of goods if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff "Shipper's weight, load and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him, or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

§ 102. Liability for nonreceipt or misdescription of goods.

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue.

Statement of the Case

This controversy relates to the shipment of a crate containing a generator valued at $10,559.47, which was to be transported on an ocean going vessel. Although the crate was lost prior to loading aboard the vessel, the steamship company-petitioner issued a bill of lading falsely stating that the crate was on board the vessel. This bill of lading was negotiated against respondent-consignee's irrevocable letter of credit. Had the bill of lading not been falsely stamped with the "on board" stamp, the letter of credit would not have been honored. There is no question as to liability. The question the District Court and the United States Court of Appeals had to decide, considering these facts, was, may the steamship company-petitioner limit its liability to $500 per package?

On the first appeal, after the District Court permitted petitioner to limit its liability to $500, the United States Court of Appeals for the Second Circuit remanded the matter back to the District Court for additional findings of fact and to determine whether section 22 of the Act, 49 U.S. Code, sec. 102 (the Pomerene Act), applies here, and if it does, whether recovery under that section is affected by the $500 per package COGSA limitation. The District Court heard no additional facts and found that the Pomerene Bills of Lading Act did not apply. The case was

again submitted on a second appeal to the Second Circuit, where a panel consisting of Judges Feinberg, Waterman and Van Graafeiland heard the argument. The panel on the first appeal was composed of Judges Feinberg, Waterman and Smith. Judge Van Graafeiland, who was hearing the appeal for the first time, wrote the opinion in which all concurred. The decision given follows logically a series of cases set forth by the Court of Appeals. It was neither a startling nor radical departure from any earlier decision of either the Court of Appeals or the Supreme Court of the United States, nor is it in opposition to any ruling of the Court of Appeals for any other circuit. A petition for rehearing *en banc* was denied. The case has thus been heard, and reviewed, by five judges of the Court of Appeals for the Second Circuit.

The facts, as set forth by the petitioner in its brief, contain certain misleading statements and although not pertinent tend to confuse the issue. On page 6 of respondent's brief, reference is made to a "received for shipment" bill of lading, dated March 15, 1974. No such bill of lading was ever issued, and neither the District Court nor the Second Circuit found that such bill of lading was issued. On page 7 of petitioner's brief, the petitioner states that after the departure of the S.A. NEDERBURG, petitioner reviewed ITO's dock receipts and issued a bill of lading stamped "on board" for all 12 pieces. The facts, are and were so found by the District Court, in its opinion (page 7a of the appendix to petitioner's brief), to be:

> "Although the bill of lading indicated that all twelve pieces of cargo had been loaded on board the NEDERBURG on March 22, 1974, the stevedore's records reveal that only eleven cartons were loaded and this over a three-day period commencing on that date."

Petitioner further states, on page 7, that the Court found the missing crate to have been loaded on a prior vessel. The Second Circuit panel questioned this finding in that

there were no facts to support it, and, in fact stated that the cargo was "already misplaced when the bill of lading was issued" (page 10b of the appendix to petitioner's brief). It is further stated, on page 7 of petitioner's brief, that the decision was appealed to the Second Circuit Court of Appeals by petitioner. Actually it was appealed in both instances by respondent. Again, on page 10 of petitioner's brief, they erroneously refer to the "received for shipment" bill of lading (which was never in fact issued), and that all packages were on board the vessel as of the date the stamp was placed on the bill of lading (when in fact they were not).

REASONS FOR NOT GRANTING THE WRIT

The Decision Was Given Full Consideration On Three Occasions and Follows In Logical Order The Earlier Decisions of Both The Supreme Court of the United States and The Court of Appeals for the Second Circuit, And Presents No Conflict Between Statutes.

The first panel of the Court of Appeals for the Second Circuit *sua sponte* raised the issue as to whether the Pomerene Bills of Lading Act of 1916 would cover or apply to the case at hand, in that it was a codification of an already substantial body of law holding carriers liable to consignees, and good faith assignees for value, in misrepresentations in their bills of lading. The second panel of the Court of Appeals for the Second Circuit found that it did apply. It concluded also that, "The Pomerene Act contains no limitation of liability provisions similar to Section 4(5) of COGSA. Section 22 provides that a holder in good faith for value of an order bill is entitled to recover its 'damages'. 'This means any damages he may have sustained'" (pages 8b & 9b of the appendix to petitioner's

brief). COGSA is not in conflict and in fact specifically states *"nothing in this chapter shall be construed as repealing or limiting* the application of *any* part of Sections 81 to 124 of Title 49" (the Pomerene Bills of Lading Act") (46 U.S.C. § 1303(4)) (Emphasis added).

The ruling of the Court of Appeals for the Second Circuit is supported by established admiralty law, set forth in its opinions herein. There is nothing radical in an opinion which simply holds that, when Congress in enacting COGSA, said that nothing therein shall be construed as repealing or limiting the application of anything in the Pomerene Act, it meant what it said.

VINCENT L. LEIBELL, JR.
Counsel for Respondent

JOHN T. KOCHENDORFER
BIGHAM, ENGLAR, JONES & HOUSTON
14 Wall Street
New York, New York 10005

Of Counsel

(68225)